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IN THE SUPREME COURT

OF THE UNITED STATES

(OCTOBER TERM 1977)

NO. 77-1267

LEWIS T. WIREMAN

Petitioner

vs.

INDIANA SUPREME

COURT DISCIPLINARY COMMISSION

Respondent

ON PETITION FOR

WRIT OF CERTIORARI

BRIEF FOR RESPONDENT IN OPPOSITION

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Indiana Supreme Court
Disciplinary Commission

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OCTOBER TERM, 1977

NO. ~~A-590~~ 77-1267

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vs.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION

I.

Opinion Below

The Petitioner's summary of the opinion below is correct. The opinion below was rendered October 14, 1977.

II.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

III.

Questions Presented

The Petitioner wholly fails to argue, and has, therefore, waived, his questions (1)(a), (b), (c), (d), (g), (i), (2)(a), (c), (3)(c), (4), and (7). The balance of the questions presented are responded to below in Respondent's argument.

IV.

Constitutions, Statutes, And Rules Involved

The Petitioner has fairly summarized those provisions of the various constitutions, statutes and rules he claims have application to the questions presented.

V.

Concise Statement Of The Case

The Respondent is disappointed with the Petitioner's statement of the case. The state-

ment does not accord with Supreme Court Rule 23(e). It contains, in the main, matter that is argumentative and self-serving.

VI.

Argument

The Respondent first asserts that he was denied due process of law when the direct testimony of Commission witness David Banton was not stricken by the Hearing Officer when Banton became unavailable for cross-examination.

The Petitioner has not and cannot demonstrate that he was affected injuriously by the ruling of the Hearing Officer. The Supreme Court of Indiana, in considering this issue, determined as follows:

> "(I)n the interest of fairness, we have excluded the testimony of David Banton and the Disciplinary Commission's exhibits purporting to connect the respondent to Mr. Banton's unavailability from the consideration of misconduct."
> (Petitioner's Brief, Exhibit A, p. 54)

In view of the decision of the Indiana Supreme Court to not consider the direct examination of

the subject witness, the Respondent's inability to cross-examine such witness was harmless.

The Petitioner next asserts that he impermissably was prevented from presenting testimony of his witness Ronald Cox as to the behavior of a Commission witness while in prison. The Petitioner has failed to demonstrate how and when the federal question sought to be reviewed was raised below and the ruling of the court below thereon. The Petitioner has waived this alleged ground for review.

The Petitioner's third ground for relief in his claim that he was denied due process of law when the testimony of two (2) of his witnesses was circumscribed by order of the Hearing Officer on account of a wilfull violation by Petitioner of the rule regarding separation of witnesses.

The record below amply demonstrates that the subject disciplinary hearing was conducted as a private, closed hearing in which the various witnesses were admonished to not reveal their

testimony to others. (Tr. pp. 2, 119, 147, 148, 160, 207, 217, 218, 219, 220, 221, 240, 280, 281, 339, 364, 410).

During the Petitioner's case, he called his wife Phyllis as a witness. The Commission moved the Hearing Officer not to permit Mrs. Wireman to testify on the ground that it had been conclusively shown that Mrs. Wireman listened to tape recordings made by the Petitioner of portions of the testimony of witnesses who earlier had testified in the disciplinary proceeding. Thereupon, the Hearing Officer asked the Petitioner whether this was true and Petitioner's counsel replied that it was. Accordingly, Mrs. Wireman was prohibited from testifying to any matter which had been discussed and recorded during the proceeding in the hearing room.

Another witness called by the Petitioner during his case was one Paul Banton. At the outset of Mr. Banton's testimony, counsel for the Commission established through preliminary

examination that before being called to testify he had been given by Petitioner's attorney, and had read, a transcript of Commission witness Richard Dean Smith's testimony. With this preliminary showing having been made, the Hearing Officer announced that this act was "reprehensible" and he prohibited the witness from testifying further.

The Hearing Officer clearly had the right to prohibit those witnesses from testifying who, at the instance of the Petitioner and his counsel, had violated the secrecy of the hearing and the order for separation of witnesses. Such a ruling by the Hearing Officer was clearly within his discretion. Numerous federal cases hold that trial judges do have discretion to prohibit witnesses to testify who have violated a separation order, if the violation of the order was "with the consent, connivance, procurement or knowledge of the defendant or his counsel". See, for example, United States v. Schaefer (1962), 299 F.2d 625 and United States v. Kiliyan (1972), 456 F.2d 555.

The Petitioner asserts next that he was denied the opportunity to demonstrate that the disciplinary charges were the result of a political conspiracy. The Indiana Supreme Court correctly answered this contention when it held as follows:

> "(T)his alleged conspiracy did not involve any witness to the proceeding. The respondent was allowed to demonstrate bias and prejudice of the witnesses who testified; he was only precluded from developing evidence of prejudice of those who had not adversely testified against him. This Court finds that this evidence was immaterial and properly excluded." (Petitioner's Brief, Exhibit A, p. 52)

Petitioner's fifth assertion is that the evidence introduced against him did not support certain of the violations of the Code of Professional Responsibility for Attorneys at Law for which he was disciplined. Specifically, he says that his conduct as judge was not in violation of such Code. The Indiana Supreme Court considered and properly rejected this erroneous contention. See Petitioner's Brief, Appendix A, pp. 51, 54-59.

Apparently, the Petitioner argues that the Respondent did not adhere properly to the Rules of the Indiana Supreme Court in processing the subject grievance. He cites no authority and does not show, or attempt to explain, how he allegedly was prejudiced thereby.

The Petitioner makes the bald assertion that the Indiana Supreme Court lacked jurisdiction to discipline the Petitioner because of Petitioner's underlying criminal conduct. This assertion was not made below and cannot be advanced for the first time before this Court. See Petitioner's Brief, Appendix A and B.

Conclusion

The decision below is clearly correct. For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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